

SERVED: February 27, 2003

NTSB Order No. EA-5024

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 25th day of February, 2003

_____)	
MARION C. BLAKEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-16537
v.)	
)	
SPENCER LAURENCE SEYB,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Patrick J. Geraghty, issued on August 14, 2002, following an evidentiary hearing.¹ The law judge affirmed an order of the Administrator, on finding that respondent had violated 14 C.F.R. 91.123(a), 91.129(i), and 91.13(a) of the Federal Aviation Regulations ("FARs").² We deny

¹ The initial decision, an excerpt from the transcript, is attached.

² Section 91.123(a), as pertinent here, prohibits deviation from clearances. Section 91.129(i) prohibits landing at an airport

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the appeal.

Respondent was the non-flying pilot-in-command (PIC) of a Southwest Airlines 737 aircraft on a passenger-carrying flight to the Reno, Nevada Airport. The aircraft was cleared to land on Runway 16L, but landed on Runway 16R instead. The record contains a transcript of the tower tape (Exhibit C-2). The transcript indicates that respondent expected to be cleared to land on Runway 16R ("southwest three fifty four is with you for one six right") but immediately after that comment, the tower responded with "...change to and cleared to land runway one six left." Respondent acknowledged that clearance clearly and directly, by answering "cleared to land one six left southwest three fifty four."

Respondent admitted deviating from the clearance by landing on the wrong runway. He raised no specific affirmative defenses; however, he denied that his actions were careless. At a prehearing conference to address the Administrator's motion for judgment on the pleadings, the law judge reviewed the case law. In light of respondent's failure to present any fact that would raise a legitimate affirmative defense, he found that the violations of sections 91.123(a) and 129(i) had been proven.³ In

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with an operating control tower without receiving a clearance. Section 91.13(a) prohibits careless or reckless operations so as to endanger the life or property of another.

Respondent filed a NASA report and sanction was waived.

³ The law judge discussed various affirmative defenses the Board has considered, such as a pilot-in-command's reasonable reliance
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response to respondent's vigorous contention that he had not been careless, the law judge elaborated on the case precedent regarding § 91.13(a) (formerly § 91.9) carelessness. He explained, citing numerous cases (see Prehearing Conference Transcript at 6-16), that separate evidence of carelessness was not required in a case such as this. Accordingly, he ruled that any hearing need not and would not take evidence on that issue.

At the prehearing conference, the law judge also heard argument that respondent had been prejudiced by the Administrator's delay in prosecution. The law judge determined that the hearing would be limited to that issue and to proof that actual prejudice had resulted.

At the hearing, respondent argued that, due to the delay in prosecution, he was not able to obtain certain data, such as radar plots and the names of crew on other aircraft at Reno, contemporaneously. The law judge determined that, in light of respondent's admissions in his answer and later, this information was irrelevant. The law judge concluded that whatever delay might have occurred could not have impeded respondent's defense, given respondent's admission of all material facts. The law judge also once again declined to hear opinion testimony regarding human factors and other issues going to the question of

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on the actions of the flying co-pilot, but found no factual basis for them in this case.

respondent's alleged carelessness.⁴

On appeal, respondent claims that the law judge's decision to preclude respondent's evidence was arbitrary, capricious, and a denial of due process. We see no basis for respondent's contentions. Indeed, in light of the law judge's extensive elucidation of precedent, we need only briefly expand on it here.

The Administrator consistently includes a "careless or reckless" charge (i.e., a § 91.13(a) charge) in her complaints charging violation of operational regulations. This is sometimes termed a "residual" or "derivative" carelessness violation, as opposed to an "independent" carelessness violation (see infra). Under the Administrator's interpretation of her regulations, a charge of carelessness or recklessness under § 91.13(a) is proven when an operational violation has been charged and proven. The cases that have established this policy are too numerous to list, some of the most recent being Administrator v. Nix, NTSB Order No. EA-5000 (2002) at 3; and Administrator v. Pierce, NTSB Order No. EA-4965 (2002) at n.2.

The cases cited by respondent – Administrator v. Westhoff, NTSB Order No. EA-3596 (1992), and Administrator v. Slikker, NTSB Order No. EA-4736 (1998) – are not on point. In those cases (in contrast to here), the Administrator's orders charged section 91.13(a) violations *independent of any operational violations*.

⁴ Respondent argued, for one, that the controller spoke too quickly to be understood.

That is, the Administrator's complaints only charged violation of section 91.13(a); no other FAR violations were charged in those two cases. Therefore, carelessness or recklessness had to be independently proven by a showing of actual or potential endangerment.

In light of the established case law, the law judge did not abuse his discretion when he refused to take evidence intended to show that respondent was not actually careless and that there was no danger created by landing on the wrong runway. Under the Administrator's interpretation of her regulations, actual or potential endangerment is not required to sustain a residual § 91.13 charge. Respondent's citation to Administrator v. Eger, 2 NTSB 862 (1974), is also unavailing. In Administrator v. Thompson, 7 NTSB 714, 716 (1991) at n.7, the Board stated:

The Board is also of the view that the finding of a violation of an operational FAR provision ... without more is sufficient to support a finding of a "residual" or "derivative" § 91.9 [now 91.13] violation....[Citations omitted.] While one of the cases cited by respondent in his brief, *Administrator v. Eger*, 2 NTSB 862 (1974), does stand for the proposition that there may be situations where a violation of 91.9 will not be found despite the showing of an operational violation if the potential for endangerment is "sufficiently remote," that rationale has not been followed in any other case.⁵

As to respondent's continuing argument that landing on the wrong runway should be excused because he was busy in the cockpit, the law judge correctly found that respondent failed properly to

⁵ In any case, landing on the wrong runway at a controlled and active airport clearly constitutes, if not actual endangerment, potential endangerment.

pursue that argument as an affirmative defense to the operational charges and failed to present any facts to support it in response to the Administrator's motion for judgment on the pleadings. In any case, and also as the law judge noted, we have considered that and other affirmative defenses to the charge of failing to follow a prescribed clearance. Landing on the correct runway is so basic a requirement that respondent's generalized claim that he was busy with other tasks is insufficient to justify dismissal. See Administrator v. Frederick and Ferkin, NTSB Order No. EA-3600 (1992) at 6-7 ("[O]ther duties were [not] so extensive or more significant that such a fundamental matter as altitude clearance might be justifiably ignored, especially during ascent and descent."). Moreover, respondent's argument that the controller spoke too quickly to be understood is belied by the fact that respondent clearly repeated the clearance to land on Runway 6L.

Similarly, respondent has not established the facts needed to warrant a finding that he reasonably relied on the flying pilot. See Administrator v. Fay & Takacs, NTSB Order No. EA-3501 (1992) at 9 ("[a]s a general rule, the pilot-in-command is responsible for the overall safe operation of the aircraft. If, however, a particular task is the responsibility of another, if the PIC has no independent obligation (e.g., based on operating procedures or manuals) or ability to ascertain the information, and if the captain has no reason to question the other's performance, then and only then will no violation be found.").

Respondent also raises a procedural argument. He claims that he was denied due process due to the Administrator's delay in prosecution. We see no basis for dismissal on these grounds.⁶

Respondent knew at once that he had deviated from a clearance and he filed a NASA report (so that sanction might be waived in the event the Administrator took enforcement action against him). In that circumstance, he was capable of taking whatever action he considered necessary to preserve evidence appropriate to his defense. Moreover, the record only shows that respondent's counsel was unable to get the Administrator to respond to his efforts to settle the case prior to the complaint being served.

That is not, however, the primary basis for our decision. There is a more fundamental problem with respondent's argument. Respondent admitted all the material facts. None of the witnesses for whom a proffer was made possessed any facts material to any potentially exculpatory affirmative defenses. As the law judge noted, the various opinion witnesses were proffered to testify regarding the issue of potential endangerment. The various airline crews at the airport at the time – whose names

⁶ The Board has adopted a rule, at 49 C.F.R. 821.33 (the so-called stale complaint rule), that provides in defined cases for dismissal of proposed suspensions upon, for one, proof of certain delay in prosecution by the Administrator. The purpose of the rule is to ensure that a respondent's ability to defend himself is not compromised by prosecutorial delay. Outside this rule, which does not apply in this case, we have also considered dismissal when actual prejudice has been proven. See (continued...)

respondent allegedly was unable to obtain because of the Administrator's delay – were proffered to testify to the lack of actual endangerment. As we have discussed, neither actual or potential endangerment testimony is relevant in this case, as the carelessness charge is sustained upon a finding of an operational violation. We therefore agree with the law judge's conclusion that respondent failed to demonstrate how his defense was harmed by any delay.

Respondent as an airline transport pilot-rated PIC is held to the highest degree of care. He had the ultimate and overall responsibility for the safe operation of the aircraft. He failed in that responsibility when he, communicating directly with the tower, accepted the clearance to land on 6L and instead allowed the flying co-pilot to land on 6R. We see nothing in his appeal to warrant a result different from that found by the law judge.

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's appeal is denied.

HAMMERSCHMIDT, Acting Chairman, and GOGLIA, BLACK, and CARMODY, Members of the Board, concurred in the above opinion and order.

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Administrator v. Wells, 7 NTSB 1247 (1991) at 1249.